IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

ARBITRATION PETITION (LODG.) NO.692 OF 2007

Runwal Constructions ..Petitioner.

Vs.

Bombay Wire Ropes Ltd. and others ..Respondents.

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Mr. Virag Tulzapurkar, Senior Advocate with Ms. S. Srikrishna i/b M/s. Kanga & Co. for the Petitioner.
Mr. Milind Sathe, Senior Advocate with Mr. S.C. Naidu with Mr. S.R. Ingavle i/b M/s. C.R. Naidu & Co. for Respondent No.1.
Mr. D.D. Madon, Senior Advocate with Mr. Cyrus Ardeshir i/b Desai, Desai & Currimjee for Respondent No.2.

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CORAM: **DR. D.Y. CHANDRACHUD, J.**

19th December, 2007.

P.C. :

1. Relief has been sought in these proceedings under Section 9 of the Arbitration and Conciliation Act. The prayers before the Court are for (i) The appointment of a Receiver in respect of the immovable property which forms the subject matter of the dispute; (ii) An injunction restraining the Respondents from transferring the property or creating third party rights; (iii) An injunction restraining the Respondents from disturbing the

possession of the Petitioner; (iv) A mandatory order permitting the Petitioner to carry out development activities; and (v) An order restraining the advocates for the Respondents from parting with the possession of the title deeds. The prayer for the appointment of a Receiver has not been pressed during the course of oral submissions.

2. The First Respondent is the owner of land admeasuring about 1,55,697 sq. mtrs situated at Thane. On 29th December, 2005 an agreement was entered into between the Petitioner and the Respondents to which the Second Respondent is a confirming party. By the agreement, the Respondents agreed to grant development rights to the Petitioner empowering and authorizing the Petitioner to sell, transfer and assign the land at and for a consideration of Rs.27.50 Crores. The consideration was to be distributed between the First and the Second Respondents in the ratio of Rs.11 Crores and Rs.16.5 Crores respectively. The agreement provided for the payment of the purchase price in installments. An amount of Rs.13,10,63,220/- has been paid by the

Petitioner to the Respondents. The agreement contemplated that certain permissions were to be obtained by the Respondents. Among them were (i) A closure certificate from the Government of Maharashtra and (ii) A No Objection Certificate from the Commissioner of Labour of the State Government. On the date on which the agreement was entered into an order had been passed by the Government under the provisions of Section 10(3) and 10 (5) of the Urban Land (Ceiling and Regulation) Act, 1976. The agreement contemplated that the Respondents as vendors would be adopting proceedings for challenging the order passed by the State Government and in the event that an order of remand was passed by the appellate authority, a certain part of the consideration would be paid. It is not disputed that upon an order of remand being passed in the present case, the stated consideration as required by clause 2(d) of the agreement was paid. Proceedings are now pending before the Supreme Court in a Special Leave Petition filed by the Government of Maharashtra. On 3rd August, 2007 an order has been passed by the Supreme Court that status quo as of the date of the order would be maintained in

the meantime.

3. The parties have agreed to refer the disputes and differences which have arisen between them to arbitration and an order of reference has been passed by this Court. In these proceedings an interim measure of protection is sought under Section 9 of the Arbitration and Conciliation Act, 1996.

4. Under the agreement, the Petitioner was granted an irrevocable licence to enter upon the land in order to carry out development activities. This was coupled with a power of attorney. The agreement was cancelled by a communication dated 2nd November, 2007. The cancellation proceeded on the basis that there was a default in payment by the Petitioner of the installments which fell due under the agreement. The termination being on the ground of non-payment, the issue which has been canvassed before the Court for the purpose of the application under Section 9 is whether as a matter of fact, there was prima facie non-compliance by the Petitioner of the obligation cast in the agreement

for the payment of the balance consideration.

5. In order to appreciate the controversy, it would be necessary to advert to some of the relevant provisions of the agreement. The agreement that was entered into on 29th December, 2005 is prima facie not a mere agreement for development, but an agreement whereby apart from an entitlement to develop the property, an interest was to be created in favour of the Petitioner. This, prima facie, is evident from (i) Clause 1 of the agreement which empowers and authorizes the Petitioner to sell, transfer, assign and to deal with the property in any manner whatsoever; (ii) Clause 17 of the agreement under which the vendors agreed to convey and transfer absolutely their entire right, title and interest in respect of the land to the Petitioner; and (iii) Clauses 21 and 22 of the agreement under which apart from the assignment, the Petitioner was entitled to sell, dispose of, mortgage and deal with the building and tenements that were to be constructed on the land.

6. Under Clause 2 of the agreement, parties agreed that the total consideration of Rs.27.5 Crores would be paid in installments. The first four installments have been admittedly paid. An amount of Rs.13.10 Crores was paid. Under sub clause (e) of Clause 2 an amount of Rs.6 Crores was to be paid by the Petitioner on or before 15th April, 2006 while the balance of Rs.10 Crores was to be paid on or before 15th October, 2006.

7. A factory is situated on the land forming the subject matter of the dispute and a lock out was declared in 1995. Clause 5(d) postulated that approximately 156 employees were on the pay roll of the vendor as of date. Under clause 5(d) the vendor assumed the obligation to settle the claims of the employees and to obtain (i) closure permission from the Government of Maharashtra and (ii) a No Objection Certificate as required in law within a period of four months. In the event that the vendor failed to do so within the period stipulated, the Petitioner was given an option to settle with the union representing the workmen, upon which the amount paid by the Petitioner towards the dues of the workmen would be

adjusted against the installments falling due subsequent to the date on which the amount was paid by the Petitioner to the workmen. Clause 5(d) contemplated that in the event that there was any delay in obtaining the closure permission of the Government of Maharashtra or an NOC from the Commissioner of Labour, an extension would be granted by the vendor to the Petitioner for effecting payment of the further consideration under Clause 2 of the agreement. Clause 18 of the agreement inter alia contains a stipulation for the vendor obtaining a closure certificate from the State Government and an NOC from the Commissioner of Labour. Clause 18 conferred upon the Petitioner an entitlement to a proportionate extension in the period for the payment of the balance two installments in the event that any delay took place in obtaining permission. Clause 18 of the agreement provided thus :

> "18. The Vendor shall obtain the following documents :
>
> a) No Objection Certificate from the Architect of the Vendor within 15 days from the execution of these presents.
>
> b) Closure Certificate of factory from the Government of Maharashtra and N. O. C. from Commissioner of Labour / Labour Union before 15th April,

2006.

c) Remanding back (for reconsideration) of the aforesaid notification dated 3rd March 2005 and notice dated 7th April 2005 under ULC Act, to the Additional Collector and Competent Authority, Thane as mentioned in clause 5(h) above within a period of 30 (thirty) days from the date of execution of these presents.

It is hereby agreed that notwithstanding what is stated in clauses 2 and 3 herein in the event of any delay on the part of the Vendor in obtaining the above approvals / permissions then the Developer shall be entitled to proportionate extension in the time period for payment of the two balance installments of consideration as mentioned in sub-clauses (e) and (f) of clause 2 above payable to the Vendor and the Confirming Party." (emphasis supplied).

8. Under Clause 6 of the agreement the vendors were required to obtain a title certificate. Under clause 7 a power of attorney was executed by the vendor in favour of the Petitioner authorizing the Petitioner to develop and sell the property. Under Clause 8 an irrevocable licence was granted in favour of the Petitioner to enter upon the property for carrying out development activities. Under clause 9 parties agreed to a joint survey for ascertaining the exact area upon which the price that was payable was to be proportionately altered in the event of any increase or

decrease beyond an area of 1,60,000 sq. mtrs. Upon the execution of the agreement, Clause 11 provided that it was agreed that the Respondents would not create any third party rights or part with possession.

9. The bone of contention is whether the obligation of the Petitioner to pay the remaining two installments respectively of Rs.6 Crores and Rs.10 Crores under Clauses 2(e) and 2(f) had arisen. The contention of the Petitioner is that under Clause 5(d) of the agreement as well as under Clause 18(b), the Respondents were under an obligation to obtain a closure certificate from the Government of Maharashtra and an NOC from the Commissioner of Labour. The case of the Petitioner is that the Respondents failed to comply with their obligation to do so, and hence the Petitioner would be entitled to a proportionate extension in the period of time stipulated for the payment of the balance two installments. On the other hand, the contention of the Respondents is that permission for closure was not required under the provisions of Chapter V B of the Industrial Disputes Act, 1947

because the total number of employees in the immediately preceding period of 12 months till 31st August, 2006 had fallen below one hundred. Secondly, it has been contended on behalf of the Respondents that by a letter dated 6th December, 2006 the Petitioner had informed them that after 31st December, 2006, the Petitioner would take upon itself the obligation of obtaining the aforesaid permission and the Petitioner would settle with the labour force and obtain an NOC at the cost and expense of the Respondents.

10. These submissions are now considered for a prima facie assessment of the application under Section 9 of the Arbitration and Conciliation Act, 1996. On 29th December, 2005 when the agreement was executed, the parties contemplated that the permission of the Government of Maharashtra would be required for the closure of the factory and an NOC would be necessitated from the Commissioner of Labour. Clause 5(d) of the agreement refers to the engagement of 156 employees on the pay roll of the vendor on the date of the agreement. That meant that as on the

date of the agreement the provisions of Chapter V B of the Industrial Disputes Act, 1947 would be attracted. Under Clause 5 (d) and Clause 18 of the agreement, the obligation to obtain the permission of the Government of Maharashtra and an NOC from the Commissioner of Labour was assumed by the Respondents. What clause 5(d) contemplated was that if the Respondents failed to do so within a stipulated period, the Petitioner would be entitled to obtain such permission upon which the actual amount paid towards the settlement of the dues of the workmen would be adjusted against the balance of the installments payable. Both Clause 5(d) and Clause 18 contemplated a proportionate extension of time for the payment of the two remaining installments. It is in this context that the Petitioner by its letter dated 6th December, 2006, called upon the Respondents to comply with their obligation to settle the dues of the labour force failing which the Petitioner stated that it would be entitled to do so after 31st December, 2006. This letter prima facie cannot be regarded as superseding the primary obligation which was cast upon the Respondents to obtain the permissions of the State Government and of the Commissioner

of Labour. In response to the letter dated 6th December, 2006, the Respondents in a letter dated 25th December, 2006 purportedly stated that closure permission was not required under Chapter V B and that an NOC from the Commissioner of Labour would not arise. Subsequently on 27th August, 2007 the Respondents claimed that they had in fact stated that the Petitioner may retain a sum of Rs.51.50 lacs towards the dues of the workmen and pay over the balance which was payable to the Respondents. At the present stage, it will be necessary to note that the contention of the Respondents was not that it was not their obligation to settle with the workmen at all but that since 36 workmen remained, the provisions of Chapter V B of the Industrial Disputes Act, 1947 would no longer be attracted. However, the fact remains that the agreement contemplated that the Respondents were required to obtain both closure permission from the State Government as well as an NOC from the Commissioner of Labour. Insofar as the NOC from the Commissioner of Labour is concerned, the Petitioners have relied upon a notification issued by the State Government under the Maharashtra Regional and Town Planning Act, 1966 on

19th June, 2007 notifying certain amendments to the Development Control Regulations for the Thane Municipal Corporation. The amended provisions contemplate the requirement of an NOC from the Commissioner of Labour where a conversion is sought of land which falls within an industrial zone to a residential or commercial purpose in respect of closed industries. It is fairly not in dispute between the Learned Counsel that the requirement of an NOC from the Commissioner of Labour which was contemplated in the agreement was not merely with reference to the provisions of the Industrial Disputes Act, 1947, but in view of the operative directions issued by the State Government even prior to the notification dated 19th June, 2007 which required an NOC from the Commissioner of Labour. The vendors were obligated to obtain that NOC and closure permission.

11. The position as it stands is that no permission from the Commissioner of Labour has still been obtained. The contention of the Respondents in their letter dated 25th December, 2006 is that their obligation under the agreement was fulfilled because the

closure certificate from the State Government was not required any more. At this stage, when the merits of the rival contentions between the parties are still to be adjudicated upon by the Arbitral Tribunal, this Court cannot hold that the closure permission which the vendors had to obtain under the agreement was not necessitated by a subsequent change of circumstances. That is a matter on which evidence would have to be adduced and a determination made by the appropriate forum. However, even if closure permission was not required, parties still contemplated the requirement of an NOC from the Commissioner of Labour in terms of the directions which were operative under the MRTP Act, 1966. Therefore, prima facie, unless the Respondents fulfilled the primary obligation of obtaining the requisite permission, the obligation of the Petitioner to pay the balance of the remaining two installments would not arise. In **Nathulal v. Phoolchand**[1] while dealing with a situation where under a contract, parties assumed obligations which were sequential in nature, the Supreme Court observed as follows:

> "In considering whether a person is willing to perform his

1 1969(3) SCC 120.

> part of the Contract the sequence in which the obligations under a contract are to be performed must be taken into account. ..... If, therefore, under the terms of the contract the obligations of the parties have to be performed in a certain sequence, one of the parties to the contract cannot require compliance with the obligations by the other party without in the first instance performing his own part of the contract which in the sequence of obligations is performable by him earlier."

12. For the aforesaid reasons, I am of the view (prima facie for the purpose of the application under Section 9) that the obligation of the Petitioner to pay the installments which were due under clauses (e) and (f) of Clause 2 of the agreement had not come into existence consequent upon which the termination which is based on an allegation of default will have to be regarded as invalid. A prima facie case has therefore been made out for the grant of an interim measure of protection. The Petitioner has paid an amount of Rs.13.10 Crores under the agreement. At this stage, it would also be necessary to note that of the total land which forms the subject matter of the agreement, a portion admeasuring 69,356.39 sq. mtrs. is covered by the proceedings under the Urban Land (Ceiling and Regulation) Act, 1976 (Clause 5(g) of the

agreement). On the other hand, land admeasuring 63,505 sq. mtrs is outside the ULC proceedings. In pursuance of the agreement, an irrevocable licence was granted to the Petitioner to enter upon the property. On 28th February, 2006 a document was executed by the Respondents and by the Petitioner by which the Respondents confirmed having given to the Petitioner an irrevocable licence for carrying out development activities in accordance with Clause 8 of the development agreement. On behalf of the Respondents, it has been urged that the grant of an interim measure of protection to the Petitioner must be made conditional on the deposit by the Petitioner of the balance of the consideration. In my view, it would be inequitous to call upon the Petitioner to deposit the entire balance of the consideration having regard to the circumstance that the Petitioner has paid an amount of Rs.13.10 Crores despite which, the Petitioner would not at this stage be in a position to commence development upon the property. Counsel appearing for the Petitioner made a statement before the Court on instructions that the Petitioner would be ready and willing to deposit the balance of the installments, if the Respondents consent to the

Petitioner carrying on development on that portion of the land which does not form the subject matter of the ULC proceedings. The Respondents are not in a position to make such a concession in view of the fact that according to them the agreement for development has been terminated. The validity of the letter of termination is seriously in dispute between the parties. In the circumstances, an interim measure of protection would be necessitated.

13. Accordingly the Arbitration Petition shall stand disposed of in terms of the following directions :

Pending the hearing and final disposal of the arbitral proceedings, there shall be :

(i) An order of injunction restraining the Respondents from disposing of, alienating, encumbering or creating any right, title and interest in favour of any third party or putting up any construction on the property;

ii) An order of injunction restraining the Respondents from disturbing the occupation of the Petitioner, to the extent of and in accordance with the provisions of Clause 8 of the agreement, subject to the condition that the Petitioner shall not carry out any development or other activity and shall maintain the status quo in all respects in respect of the property;

The prayer for the appointment of a Receiver was not pressed during the course of oral submissions.